No. 87-319

Supreme Court, U.S.
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In the
Supreme Court of the United States
OCTOBER TERM, 1987

DALE ABRAHAMS, DANIEL BRUNO, MARCENE E. EDELMAN, ABRAHAM GENDERSON, GINNY M. GRUNLEY, JOHN M. HART, JOANN M. HOLMES, PHILIP PFATT, JR., LIBBY B. POHORYLES, SHARON H. POHORYLES, LARRY D. ROLLINS, ROCHELLE POULOS, NORMAN SCHAECHTER, MAHENDRA SHAH, EDWARD S. STOLL, LINDA W. SWAN, GARY ABRAHAMS, LEWIS B. COGGAN, STEPHEN L. EDELMAN, CHARLOTTE GENDERSON, KENNETH M. GRUNLEY, A. STEWART HOLMES, STEPHEN G. PARKER, LOUIS POHORYLES, STEVEN E. POHORYLES, JAMES A. POULOS, MONA SCHAECHTER, GEETA SHAH, EDWARD S. STOLL, JANE M. STOLL, CARL WEBER, Objectors,

Petitioners,

vs.

LOUIS SHULMAN, Derivatively on Behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC., and CENTRAL JERSEY INDUSTRIES, INC.,

Respondents.

BRIEF OF RESPONDENT LOUIS SCHULMAN IN OPPOSITION TO PETITION FOR WRITE OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

Respondent Louis Schulman, the derivative plaintiff in the District Court on behalf of nominal defendant Central Jersey Industries, Inc. ("CJI"), respectfully submits this brief in opposition to the petition for a writ of certiorari. The settlement, which provided an economic benefit of over $10 million to CJI, was approved by the District Court after a lengthy hearing, extensive briefing, provision for discovery by objectors,

and the development of an extensive factual record.[1] The District Court was unanimously affirmed by the Court of Appeals for the Third Circuit.

Persons allegedly holding 30,000 shares of CJI objected to the settlement and have appealed.[2]

Subsequent to its approval by the District Court, the settlement was consumated. CJI completed a public offering of over $387 million of debentures and preferred stock. In addition, with the approval of its shareholders, CJI changed its state of incorporation from New Jersey to Delaware and recapitalized and exchanged the securities provided in the settlement for still other securities. Objectors did not seek a stay of the consuma-

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1 Petitioners omit the entire record considered by either the District Court or the Court of Appeals.

2 Other objections were filed with the Court. Two were filed by two shareholders (who did not appeal), and one was filed by four shareholders who, after review of plaintiff's files by their attorney, withdrew their objections and expressed approval. Three other shareholders contacted plaintiff's counsel to express approval.

tion of the settlement or object in any way to these corporate transactions, which mooted their appeal.

The Action

This action, commenced in June 1985, challenged the purchase by CJI from its controlling stockholder, Triangle Industries, Inc. ("Triangle") of a Triangle subsidiary called Rowe Industries, Inc. ("Rowe") (the "Rowe Transaction"). The settlement achieved a reduction in CJI's economic burden, which had a present value to CJI in excess of $10 million; substantially reduced CJI's cash needs; shifted more of the risk of the transaction to Triangle; and improved CJI's chances of making a public offering to pay and redistribute its debt.

The settlement and the initial objections were thoroughly briefed and answered before District Court and received full consideration by Judge Stern at a hearing on April 28, 1986. Thereafter Objectors submitted additional contentions, which in turn, were fully briefed and answered.

In its Order dated June 3, 1986, the District Court rejected Objectors' argument and approved the settlement as fair, reasonable and adequate.

On appeal to the Court of Appeals, Petitioners recast their arguments once again and raised still new issues.

After extensive briefing and argument, the Court of Appeals affirmed the District Court and taxed costs against Petitioners.

Not satisfied, Petitioners sought en banc review. Unable to raise a single substantitive or procedural issue of merit, Petitioners' petition for rehearing was unanimously denied.

To date, ten judges have reviewed Petitioners' contentions and have found them to be without merit in law and fact. This Court, also, should summarily reject this Petition.

The Petition Should Be Denied[3]

A. There is no compelling need for this Court to review a moot question under New Jersey corporation law. There is no issue of federal or constitutional law in this diversity case - and there never has been.

B. The facts in the full record before District Court fully justified the approval of the settlement. Petitioners' version of the facts which omits or, worse, misstates, much of the record, cannot withstand scrutiny.

C. Transactions and events to which Petitioners did not object, subsequent to the District Court's approval of the settlement (as to which Petitioners did not seek a stay) rendered the appeal, and render this petition, moot and estop Petitioners from challenging the settlement. What is more, these transactions have made it impossible to grant the relief sought

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3 It is with no lack of respect to this Court that we are keeping this response short. Respondent Triangle will be submitting a more comprehensive brief in opposition to the Petition, in which we join. There is no need to multiply paper.

by the Petitioners. Thibaut v. Ourso, 705 F.2d 118, 120-121 (5th Cir. 1983); C&C Products, Inc. v. Messick, 700 F.2d 635, 636 (11th Cir. 1983); 9 Moore, Federal Practice, ¶208.03 at 8-9 (2d Ed. 1979) and cases cited therein. See, also In re Cantwell, 639 F.2d 1050 (3d Cir. 1981); Federal Savings & Loan Insurance Corp. v. Hykel, 468 F.2d 1386 (3d Cir. 1972).[4]

D. The law favors settlements. Williams v. First Nat'l Bank of Pauls Valley, 216 U.S. 582 (1910). Under the criteria of the Third Circuit, Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) (as well as other circuits), the District Court properly exercised its discretion in finding the settlement to be fair, reasonable and adequate. Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d

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4 Petitioners totally misread the opinions they cite. In Greenfield v. Villager Industries, 483 F.2d 824 (3d Cir. 1973) (a decision authored by a member of the Court of Appeals panel here), the notice of class settlement "was fatally defective," thereby violating due process, and the settlement agreement specifically provided that it would not "become effective, nor be consummated...if an appeal is taken..." (see Girsh v. Jepson, 521 F.2d 153, 159 (3d Cir. 1975), which explains Villager Industries). In United Properties Inv. v. Emporium Dept. Stores Inc., 379 F.2d 55 (8th cir. 1967), the settlement agreement specifically provided for repayment if settlement approval was reversed on appeal.

956, 965 (3d Cir. 1983); Shlensky v. Dorsey, 574 F.2d 131, 147 (3d Cir. 1978); Girsh v. Jepson, 521 F.2d 157; Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), cert. denied, 419 U.S. 900 (1974), reh. denied sub nom., Abate v. Pittsburgh Plate Glass Co., 420 U.S. 913 (1975). An appellate court's review of a settlement approval takes into consideration the record upon which the decision to approve was made. Girsh v. Jepson, 521 F.2d at 159. It is well established that the discretionary judgment of a district court should be given substantial deference and should be disturbed by the appellate court only when clearly erroneous. Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 10 (1980).

E. The District Court did not abuse its discretion by denying the Objectors' demand for unfocused, extensive, additional discovery and a trial on the merits. Girsh v. Jepson, 521 F.2d 153; In re Amsted Industries Incorporated Litigation, 521 A.2d 1104 (Del. Ch. Ct., 1986) Judge Stern specifically requested that Objectors identify issues of disputed fact and give reasons why further discovery would be necessary for the

court to assess the fairness of the settlement. They did not. The District Court correctly denied their request.

F. In light of the extensive factual record, the absence of specific findings of fact in the opinions of the District Court or the Court of Appeals does not require that the discretion of the District Court in approving the settlement be overturned and the case remanded for extensive fact-finding proceedings.

Petitioners cite the requirement of fact-finding in non-jury trials under Fed. R. Civ. P. 52(a), but refer to not a single case for their novel contention that the District Court or the Court of Appeals must under all circumstances expend precious judicial resources and write a full opinion in aspiring to a derivative settlement.[5] They request this Court grant their petition and ultimately instruct the courts below to write extensive opinions.[6]

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5 Petitioners refer (quoted at pp. 8-9 of their brief) to the internal operating proceedings (IOP Chap 6) of the Third Circuit (which they did not even note anywhere below). Once more they are misguided: this action is a civil diversity case to which point b(5) of the rule directly refers.

6 Judge Stern has since retired from the bench and (footnote continued)

Where a sufficient factual record exists to support the decision of the district court, the reviewing court should affirm the district court's decision. In re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128, 1136 (8th cir. 1984) cert. denied sub nom., Reavis & McGrath v. Antinore, 469 U.S. 978 (1985).

In Flight Transportation, as here, the court of appeals was called upon to review a decision in which the district court had approved a settlement without making specific findings of fact. Relying upon the reasoning of the United States Supreme Court in Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, reh. denied, 391 U.S. 909 (1968), the court of appeals held that the absence of findings of fact was not fatal to the settlement:

> "Our review is made more difficult because the District Court did not write an opinion explaining why it deemed the Sharing Agreement to be fair, reasonable, and adequate. The Supreme Court has cautioned that, when reviewing the approval of a settlement,

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supposedly, a district judge unfamiliar with the proceeding would be directed to write the opinion.

> '[it] is essential...that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts of analysis of the law.'

Anderson, supra, 390 U.S. at 434, 88 S.Ct. at 1168. Nontheless, if

> 'the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reaons or the evidence on which they were based.'

Id. at 437, 88 S.ct. at 1170. Here, the record reflects that the District Court had before it the information necessary to consider the fairness of the Sharing Agreement. All the arguments made before us were presented to the District Court. Accordingly, we shall review the District Court's action on the basis of the record before us."

Id. at 1136 (emphasis added). The Court of Appeals then proceeded, solely on the basis of the record below, to affirm in part and vacate in part the District Court's approval of the settlement agreement, Id. at 1139.

We are confident that if this Court were required to review the record here, the facts will justify

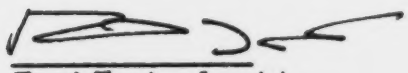
full affirmance of the decisions of the Court of Appeals and the District Court approving the Settlement.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: September 23, 1987

Respectfully Submitted,



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